

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

FRANCISCO HERNANDEZ,

Petitioner,

vs.

TIM VIRGA, Warden,

Respondent.

Civil No. 12cv1682-BEN (DHB)

**REPORT AND  
RECOMMENDATION OF  
UNITED STATES  
MAGISTRATE JUDGE RE  
DENIAL OF PETITION FOR  
WRIT OF HABEAS CORPUS**

Francisco Hernandez (“Petitioner”), a state prisoner proceeding *pro se* filed a Petition for Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. § 2254. (ECF No. 4.) Petitioner seeks relief from his August 2009 conviction in San Diego County Superior Court Case No. SCE286092 for two counts of robbery. He is currently serving a 37 years to life sentence in state prison. Petitioner raises four grounds for relief in his Petition: first, that the trial court improperly failed to order a competency hearing pursuant to California Penal Code § 1368; second, that the failure to *Mirandize* him violated his constitutional rights; third, that the trial court erred in failing to give a jury instruction on competency and intent; and fourth, ineffective assistance of counsel. Respondent filed an Answer opposing any habeas relief (ECF No. 19),<sup>1</sup> and Petitioner

<sup>1</sup> Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court’s electronic case filing system.

1 filed a Traverse (ECF No. 25) and supplemental memorandum in support of his  
 2 Traverse (ECF No. 27.) The Court has reviewed the parties' pleadings, the record, and  
 3 controlling law, and for the reasons discussed below, hereby **RECOMMENDS** the  
 4 Petition be **DENIED**.

5 **I. BACKGROUND**

6 **A. Factual Background**

7 The following facts are taken from the unpublished California Court of Appeal  
 8 Opinion in *People v. Hernandez*, Case No. D057059 (Cal. Ct. App. October 27, 2011).  
 9 (Lodgment No. 7.) The Court presumes these factual determinations are correct  
 10 pursuant to 28 U.S.C.A. § 2254(e)(1). *See Miller-El v. Cockrell*, 537 U.S. 322, 340  
 11 (2003) (finding factual determinations by state courts are presumed correct absent clear  
 12 and convincing evidence to the contrary).

13 i. The People's Case

14 On September 27, 2008, at about 8:00 p.m., Abraham Moreno and  
 15 Humberto Rodriguez were in Balboa Park watching a music video on  
 16 Moreno's cell phone while seated in Moreno's parked car. Two men  
 17 approached the car, one on each side. One of the men, who wore a red hat,  
 18 red shirt and sunglasses, with the letters "SD" tattooed on his face—who  
 19 Moreno and Rodriguez identified at trial as Ifopo—approached Moreno,  
 20 who was sitting in the driver's seat, leaned through the open window, and  
 21 said, "Look, I'm pretty fucked up. We can do this the easy way or the  
 22 hard way." Ifopo lifted up his shirt, pulled a handgun from his waistband,  
 23 and held it inside the car in front of Moreno. Ifopo told Moreno and Rodriguez  
 24 to "give [him] all [their] shit." When Moreno and Rodriguez indicated they did not have anything to give, the man standing on the  
 25 passenger side of the car—who Moreno and Rodriguez identified at trial as  
 26 Hernandez—muttered that he was "going to fucking kill somebody." Ifopo  
 27 then demanded Moreno's and Rodriguez's phones.

28 Moreno handed his phone, wallet and car keys to Ifopo. Rodriguez  
 2 gave his phone and iPod to Hernandez but, as he was about to hand over  
 3 his wallet, he asked Hernandez whether he could keep his identification.  
 4 In response, Ifopo pointed his gun at Moreno's head and said, "This is  
 5 your[] bud, right? You better shut the fuck up or I'm going to blow his  
 6 brains out." Rodriguez told Ifopo and Hernandez to "take everything" and  
 7 handed his wallet to Hernandez. Ifopo said he would leave the car keys  
 8 by the bathroom and he would "blow [their] brains out" if they retrieved  
 9 them before 10 minutes had passed. Moreno and Rodriguez sat in the car  
 10 as Ifopo and Hernandez walked away.

11 After a few minutes, Moreno and Rodriguez got out of the car,  
 12 unsuccessfully looked for the keys, and called 911 using the phone of a

1 passenger in a nearby limousine. The recording of the 911 call was played  
 2 for the jury.

3 In early October 2008, Detective Manuel Garcia of the San Diego  
 4 Police Department received a tip regarding a potential suspect with the  
 5 letters "SD" tattooed on his face. He showed Moreno and Rodriguez a  
 6 photographic lineup containing Ifopo's photo. In the photographic lineup,  
 7 Detective Garcia covered up Ifopo's tattoo with black ink, and he also put  
 8 black ink on the right cheeks of the other individuals in the lineup. Both  
 9 men identified Ifopo as the man with the gun during the robbery.  
 10

11 The police learned that Hernandez was one of Ifopo's  
 12 acquaintances. In November 2008 Detective Garcia prepared a  
 13 photographic lineup containing Hernandez's photo and later showed the  
 14 lineup to Moreno and Rodriguez. Rodriguez identified Hernandez.  
 15 Moreno indicated to Detective Garcia that he could not recognize the  
 16 second suspect from a picture, but he would recognize him if he saw him  
 17 in person. At trial, Moreno identified Hernandez as the man who had  
 18 stood by the passenger-side door of the car during the robberies.

19 On November 20, 2008, Detective Garcia interviewed Hernandez  
 20 in the county jail regarding his investigation of the robberies. Detective  
 21 Garcia showed Hernandez the lineup containing Ifopo's photo and told  
 22 him Ifopo had been identified as a suspect in a September 2008 robbery  
 23 case he was investigating. He then showed Hernandez the lineup  
 24 containing Hernandez's photo and told Hernandez he had been identified  
 25 as well. Hernandez grabbed the photo lineup and stated he did not rob  
 26 anyone. Hernandez said he knew Ifopo as "Samoan Alex." He also stated  
 27 that he and Ifopo had once smoked marijuana at a park near the San Diego  
 28 Zoo, and on that occasion Ifopo had shown him a black replica handgun  
 that Hernandez believed was a pellet gun. Hernandez told Detective  
 Garcia, "I don't remember robbing anybody."

## ii. The Defense Case

1 Hernandez's cousin, Sylvia Curia, testified that on the night of the  
 2 robbery Hernandez and his girlfriend, Shannette Kleian, babysat her infant  
 3 son so she could go to a bar to drink. On cross-examination, Curia stated  
 4 that Hernandez took her son at around 5:00 p.m., and she assumed he was  
 5 at his girlfriend's house babysitting Curia's son after that, but she did not  
 6 know whether her son remained with Hernandez after 5:00 p.m. Curia's  
 7 mother also testified that Hernandez took Curia's son to his girlfriend's  
 8 house.

9 Hernandez's girlfriend remembered that she and Hernandez babysat  
 10 Curia's son at her house in late September 2008. On cross-examination,  
 11 she stated she was not sure whether she and Hernandez babysat Curia's  
 12 son on September 27, 2008 (the night of the robberies).

13 Dr. Thomas MacSpeiden, a forensic clinical psychologist, testified  
 14 about numerous factors that can adversely affect the accuracy of an  
 15 eyewitness identification of a suspect.

16 Ifopo testified that he was doing "[a] lot of drinking and getting  
 17 high" in Balboa Park on the night of the robberies. He denied that he was  
 18

1 with Hernandez that night. Ifopo stated he was with Hernandez in a park  
 2 near downtown on another occasion when he (Ifopo) had a real gun. Ifopo  
 3 admitted that on September 27, he walked up to “[t]wo Mexicans” in a car  
 4 with his hand in his pocket, pretending to have a gun, and told them to  
 give him “everything.” He stated he once had a nine-millimeter Glock  
 handgun, but he had sold it. He testified he was “positive” he did not have  
 a gun on the night of the robberies.

5 (Lodgment No. 7 at 3-6.)

6       **B. Procedural Background**

7       On April 22, 2009, Petitioner was charged in an Amended Information with two  
 8 counts of robbery under California Penal Code § 211. (Lodgment No. 1 at 6-11.) On  
 9 August 4, 2009, a jury found Petitioner guilty of both counts. (*Id.* at 374-75.) The jury  
 10 found true an allegation that although Petitioner was not personally armed with a  
 11 firearm at the time of the robberies, he was a principal in the commission of the crimes  
 12 and was vicariously liable within the meaning of California Penal Code § 12022(a)(1).  
 13 (*Id.*) In a bifurcated proceeding, the trial court found true allegations that Petitioner had  
 14 (1) served a prior prison term within the meaning of § 667.5(b); (2) suffered two prior  
 15 serious felony convictions within the meaning of § 667(a)(1); and (3) suffered two prior  
 16 strike convictions within the meaning of § 667(b)-(i), and § 1170.12(a)-(d). (Lodgment  
 17 No. 1 at 325; Lodgment No. 2 at 1441-1443.)

18       On December 1, 2009, prior to his sentencing hearing, Petitioner filed a habeas  
 19 petition in the San Diego Superior Court. (Lodgment No. 11.) The Superior Court  
 20 denied the petition on January 27, 2010. (Lodgment No. 12.)

21       On March 16, 2010, the trial court sentenced Petitioner under the three strikes  
 22 law to a prison term of 37 years to life. (Lodgment No. 1 at 325-26.) Petitioner  
 23 appealed. (Lodgment No. 1 at 327; Lodgment No. 6.) On October 27, 2011, the Court  
 24 of Appeal affirmed his conviction. (Lodgment No. 7.) Thereafter, Petitioner filed a  
 25 Petition for Review in the California Supreme Court. (Lodgment No. 9.) The  
 26 California Supreme Court denied his petition for review in a silent denial on January  
 27 11, 2012. (Lodgment No. 10.)

28       While his direct appeal was pending, Petitioner filed a habeas petition in the

1 California Court of Appeal. (Lodgment No. 13.) The Court of Appeal denied the  
 2 petition on November 6, 2011. (Lodgment No. 14.)

3 On March 29, 2012, following the conclusion of his direct appeal, Petitioner filed  
 4 a habeas petition in the California Supreme Court. (Lodgment No. 16.) On April 13,  
 5 2012, Petitioner filed a second habeas petition in the California Supreme Court.  
 6 (Lodgment No. 15.) Both petitions were summarily denied on June 13, 2012.  
 7 (Lodgment Nos. 17, 18.)

8 On July 2, 2012, Petitioner filed a federal Petition for Writ of Habeas Corpus.  
 9 (ECF No. 1.) On July 16, 2012, the Court dismissed the Petition without prejudice and  
 10 with leave to amend because Petitioner failed to satisfy the filing fee requirement or  
 11 submit adequate proof of his inability to pay the fee, and failed to name a proper  
 12 respondent. (ECF No. 3.) On July 26, 2012, Petitioner filed his First Amended Petition  
 13 for Writ of Habeas Corpus. (ECF No. 4.) Petitioner argues (1) he was denied his right  
 14 to due process when the trial court failed to hold a competency hearing; (2) the trial  
 15 court erred in admitting his un-*Mirandized* statements; (3) the trial court erred in failing  
 16 to instruct the jury on competence and intent; and (4) ineffective assistance of counsel.  
 17 On November 14, 2012, Respondent filed an Answer to the Petition. (ECF No. 19.)  
 18 On December 17, 2012, Petitioner filed a Traverse. (ECF No. 25.) On February 24,  
 19 2013, Petitioner filed a supplemental memorandum in support of his Traverse. (ECF  
 20 No. 27.)

21 **II. DISCUSSION**

22 **A. Legal Standards For Federal Habeas Relief**

23 A federal court “shall entertain an application for a writ of habeas corpus in  
 24 behalf of a person in custody pursuant to the judgment of a State court only on the  
 25 ground that he is in custody in violation of the Constitution or laws or treaties of the  
 26 United States.” 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty  
 27 Act of 1996 (“AEDPA”) controls review of this Petition. *See Lindh v. Murphy*, 521  
 28 U.S. 320 (1997). Under AEDPA, a habeas petition will not be granted with respect to

any claim adjudicated on the merits by the state court unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(1) and (2); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding a state prisoner's habeas petition, a federal court is not called upon to decide whether it agrees with the state court's determination; rather, the court applies an extraordinarily deferential review, inquiring only whether the state court's decision was objectively unreasonable. *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Horning*, 386 F.3d 872, 877 (9th Cir. 2004).

A federal habeas court may grant relief under the "contrary to" clause if the state court applied a rule different from the governing law set forth in Supreme Court cases, or if it decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant relief under the "unreasonable application" clause if the state court correctly identified the governing legal principle from Supreme Court decisions, but unreasonably applied those decisions to the facts of a particular case. *Id.* Additionally, the "unreasonable application" clause requires that the state court decision be more than incorrect or erroneous; to warrant habeas relief, the state court's application of clearly established federal law must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). In applying 28 U.S.C. § 2254(d)(2), federal habeas courts must defer to reasonable factual determinations made by the state courts, to which a statutory presumption of correctness attaches. 28 U.S.C. § 2254(e)(1); see *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007).

To determine whether habeas relief is available under § 2254(d), the Court "looks through" to the last reasoned state court decision as the basis for its analysis. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-04 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, [federal habeas courts apply the presumption that]

1 later unexplained orders upholding that judgment or rejecting the same claim rest upon  
 2 the same ground.”). If the dispositive state court order does not “furnish a basis for its  
 3 reasoning,” federal habeas courts must conduct an independent review of the record to  
 4 determine whether the state court’s decision is contrary to, or an unreasonable  
 5 application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d  
 6 976, 982 (9th Cir. 2000), overruled on other grounds by *Andrade*, 538 U.S. at 75-76;  
 7 *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

8       “*A spare order denying a petition without explanation or citation ordinarily ranks*  
 9 *as a disposition on the merits.*” *Walker v. Martin*, 131 S.Ct. 1120, 1124 (2011); *see also*  
 10 *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011). “When a federal claim has been  
 11 presented to a state court and the state court has denied relief, it may be presumed that  
 12 the state court adjudicated the claim on the merits in the absence of any indication or  
 13 state-law procedural principles to the contrary.” *Harrington*, 131 S.Ct. at 784-85 (*citing*  
 14 *Harris v. Reed*, 489 U.S. 255, 265 (1989) (presumption of a merits determination when  
 15 it is unclear whether a decision appearing to rest on federal grounds was decided on  
 16 another basis)); *see also Hunter v. Aispuro*, 982 F.2d 344, 347-348 (9th Cir. 1992)  
 17 (California Supreme Court’s denial of a habeas petition without comment or citation  
 18 constitutes a decision on the merits). Even “[w]here a state court’s decision is  
 19 unaccompanied by an explanation, the habeas petitioner’s burden still must be met by  
 20 showing there was no reasonable basis for the state court to deny relief.” *Id.*

21       **B. Evidentiary Hearing**

22 Petitioner did not initially request an evidentiary hearing in the Petition.  
 23 However, in his Traverse, Petitioner states he is entitled to an evidentiary hearing.  
 24 (ECF Nos. 25 at 6; 27 at 6-7.) The Court finds that Petitioner has not shown that further  
 25 factual development is necessary, such that an evidentiary hearing would be warranted.  
 26 *See* 28 U.S.C. § 2254(e)(2) (listing exceptions when an evidentiary hearing may be  
 27 appropriate). Because the claims in the petition can be resolved by reference to the  
 28 record, the Court finds an evidentiary hearing is not necessary. *Schriro v. Landrigan*,

1 550 U.S. 465, 474 (2007).

2       **C. Ground One: Trial Court Failed to Hold a Competency Hearing**

3       In ground one, Petitioner alleges he was denied his right to due process when the  
 4 trial court failed to hold a hearing pursuant to California Penal Code § 1368 to  
 5 determine his mental competency. (ECF No. 4 at 6.) Petitioner claims the trial court  
 6 was provided with information, including medical reports and a sentencing motion, that  
 7 addressed his mental status. (*Id.*) Petitioner claims the information showed he had a  
 8 history of mental illness and fell within the range of mental retardation, which required  
 9 the trial court to hold a hearing under § 1368.<sup>2</sup> (*Id.*) Respondent argues this claim  
 10 should be denied because there was no evidence Petitioner was incompetent to stand  
 11 trial and the state court reasonably rejected this claim. (ECF No. 19 at 11-13.) For the  
 12 reasons set forth below, the Court agrees with Respondent.

13       Petitioner presented this claim to the California Supreme Court in his habeas  
 14 petitions. (Lodgment Nos. 15, 16.) The California Supreme Court summarily denied  
 15 his petitions without citation of authority or analysis. (Lodgment Nos. 17, 18.)  
 16 Petitioner did not raise this claim in the Superior Court or the Court of Appeal.  
 17 Therefore, there is no reasoned state court decision to which this Court can look through  
 18 to. Accordingly, the Court must conduct an independent review of the record to  
 19 determine whether the state court's denial of this claim was contrary to, or an  
 20 unreasonable application of, clearly established federal law. *See Delgado*, 223 F.3d at  
 21 982.

22       Due process is violated by the conviction of a person who is legally incompetent  
 23 to stand trial. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). "The failure to observe

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24       <sup>2</sup> California Penal Code § 1368 provides in relevant part:

25           If, during the pendency of an action and prior to judgment, a doubt  
 26 arises in the mind of the judge as to the mental competence of the  
 27 defendant, he or she shall state that doubt in the record and inquire of  
 28 the attorney for the defendant whether, in the opinion of the attorney,  
 the defendant is mentally competent . . . If counsel informs the court  
 that he or she believes the defendant is or may be mentally  
 incompetent, the court shall order that the question of the defendant's  
 mental competence is to be determined in a hearing.

procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The standard for determining competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Pate v. Robinson*, 383 U.S. 375, 388 (1966); *Dusky v. United States*, 362 U.S. 402 (1960); *Torres v. Prunty*, 223 F.3d 1103, 1106-07 (9th Cir. 2000). "[W]here the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the trial judge on his own motion . . . must conduct a hearing to determine competency to stand trial." *Torres*, 223 F.3d at 1106-07 (citing *Drope*, 420 U.S. at 172-73; *Pate*, 383 U.S. at 385.). Factors courts consider in ascertaining whether a competency hearing is required include evidence of the defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence. *Drope*, 420 U.S. at 180; *United States v. Lewis*, 991 F.2d 524, 527 (9th Cir. 1993). When determining whether a defendant's due process rights were violated, "[t]he question to be asked by the reviewing court is whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009).

Here, Petitioner did not raise the issue of his competence prior to, or during trial. In fact, a competency hearing was not specifically requested at any time. However, Petitioner's mental status was addressed during sentencing. Petitioner's counsel filed a Romero motion requesting the court strike one of his prior strike convictions under the three strikes law. (Lodgment No. 1 at 282-288.) In support of that request, the motion provided information about Petitioner's background, including that Petitioner had a history of mental illness, drug addiction, and had been tested and found to be in the low to borderline range of intellectual ability. (*Id.* at 285-288.) The motion did not, however, argue that Petitioner was incompetent.

1       Further, reviewing the record, the Court finds there is no evidence that Petitioner  
2 exhibited irrational behavior, or that his demeanor at trial or other court appearances  
3 suggested he was incompetent. For example, Petitioner testified at the hearing on his  
4 motion to suppress statements. (Lodgment No. 2 at 229-46.) Petitioner was examined  
5 on direct and cross examination. (*Id.*) The transcript from the hearing does not show  
6 that Petitioner was confused or incapacitated at any point. (*Id.*) Rather, it appears  
7 Petitioner understood the proceeding and testified in a meaningful way.

8       Petitioner also did not provide a prior medical opinion on his competence. The  
9 Court notes that Petitioner was evaluated by Dr. Meredith Friedman, Ph.D., a licensed  
10 clinical psychologist, prior to his sentencing hearing. (Lodgment No.1 at 260-74.)  
11 However, it does not appear Dr. Friedman believed Petitioner was incompetent. Dr.  
12 Friedman indicated Petitioner was addicted to drugs and his intellectual functioning was  
13 in the borderline mentally retarded range. (*Id.* at 287-88.) However, she also found  
14 Petitioner had a sincere recognition of the gravity of his behavior. (*Id.* at 288.)  
15 Notably, Dr. Friedman did not opine that Petitioner was unable to consult with counsel  
16 or comprehend the proceedings.

17       Finally, nothing suggests Petitioner was unable to consult with counsel or  
18 understand the proceedings. The prosecutor noted he had dealt with Petitioner for over  
19 a year and Petitioner had always been respectful to the Court in every hearing.  
20 (Lodgment No. 2 at 1448.) Also, Petitioner was able to draft and file documents  
21 including a habeas petition prior to his sentencing hearing (Lodgment No. 11.), a pro  
22 se motion for new counsel (Lodgment No. 5), and a pro se motion for co-counsel.  
23 (Lodgment No. 8.).

24       Having reviewed the record, including the transcripts from the pretrial motion  
25 hearing, the trial, and sentencing hearing, the Court finds nothing suggests that the trial  
26 court should have doubted Petitioner's competency. Thus, the trial court had no duty  
27 to order a competency hearing. Therefore, the California Supreme Court's rejection of  
28 this claim was not contrary to, or an unreasonable application of, clearly established

1 federal law. Accordingly, the Court recommends that Petitioner's claim in ground one  
 2 be **DENIED**.

3       **D.     Ground Two: Trial Court Erred in Failing to Suppress Un-**  
 4       **Mirandized Statements**

5       In ground two, Petitioner alleges that his Fifth Amendment rights were violated  
 6 when he was interviewed without *Miranda* warnings pursuant to *Miranda v. Arizona*,  
 7 384 U.S. 436 (1966). (ECF No. 4 at 7.) Petitioner claims he was in custody for  
 8 purposes of *Miranda* when he was interviewed by Detective Garcia at the San Diego  
 9 County jail. (*Id.*) Petitioner argues that because Detective Garcia did not read him his  
 10 *Miranda* rights, his statements should have been suppressed. (*Id.*) Respondent counters  
 11 that this claim should be denied because the state courts reasonably rejected this claim.  
 12 (ECF No. 19 at 13-17.) For the reasons set forth below, the Court agrees with  
 13 Respondent.

14       Petitioner presented this claim to the California Supreme Court on direct appeal.  
 15 (Lodgment No. 9.) The court denied his claim without comment. (Lodgment No. 10.)  
 16 Accordingly, the Court will look through the silent denial to the Court of Appeal's  
 17 October 27, 2011 opinion. *Ylst*, 501 U.S. at 804. The Court of Appeal rejected  
 18 Petitioner's claim, applying federal and state case law. (Lodgment No. 7.) The Court  
 19 of Appeal analyzed the facts under the four-factor test set forth in *Cervantes v. Walker*,  
 20 589 F.2d 424, 427-28 (9th Cir. 1978), and concluded that under the totality of the  
 21 circumstances, Petitioner was not in custody for *Miranda* purposes. (*Id.* at 20-24.)  
 22 Therefore, the Court of Appeal held the trial court did not err in denying Petitioner's  
 23 motion to suppress. (*Id.* at 25.) Specifically, the Court stated:

24           Here, since Hernandez was not free to leave the detention facility  
 25 entirely, we analyze the facts in light of the four *Cervantes* factors this  
 26 court adopted in *Macklem* to determine whether some additional degree of  
 restraint was imposed upon him that forced him to participate in the  
 interview. (See *Macklem, supra*, 149 Cal.App.4th at pp.695-696.)

27       Regarding the first *Cervantes* factor, the language used to summon  
 28 the inmate for questioning, the record shows Hernandez was summoned  
 to the visiting room through the loudspeaker when someone announced,

1       “Hernandez, you have a professional visit.” When Hernandez entered the  
 2 room, Detective Garcia, who was dressed in civilian clothes, identified  
 3 himself, showed Hernandez his badge, and told Hernandez he was  
 4 investigating a robbery that occurred in Balboa Park in September 2008.  
 5 Detective Garcia made no threats and said nothing to suggest he absolutely  
 6 had to speak with Hernandez during the interview. We conclude there is  
 7 no evidence the language summoning Hernandez to the visiting room was  
 8 coercive.  
 9

10      Regarding the second *Cervantes* factor, the physical surroundings  
 11 of the questioning, Detective Garcia described the visiting room as an area  
 12 where family, defense attorneys, and law enforcement commonly meet  
 13 with inmates. He testified the room contained three booths where visitors  
 14 speak with inmates, and in each booth bars separate the inmate’s area from  
 15 the visitor’s area. Detective Garcia explained that although the doors  
 16 behind Hernandez and him were locked, Hernandez could knock on his  
 17 door to summon a guard and tell him he was done.

18      Hernandez gave similar testimony, indicating he and the visitor  
 19 would be on opposite side of the bars, and although the door would be  
 20 locked behind him, there was a buzzer he could push to let the deputies  
 21 know he was done if he did not want to talk to the visitor. Acknowledging  
 22 he was in custody at the jail for a parole violation, Hernandez indicated he  
 23 previously had been interviewed in the visiting room by attorneys,  
 24 investigators and police officers while in custody. The record shows he  
 25 was not handcuffed when he entered the room, and he remained uncuffed  
 26 during the interview. When asked during the hearing on his suppression  
 27 motion whether he went to the visiting room “freely,” Hernandez stated,  
 28 “Yes.”

1        These facts relating to the physical surroundings where the  
 2 interview took place weigh against any finding of coerciveness because  
 3 Hernandez acknowledged he freely participated in the interview and knew  
 4 he would be taken out of the visiting room at his request. In this regard,  
 5 we note that “an interview room where attorneys and [family] visit . . .  
 6 inmates is as close to neutral territory as is available in the detention  
 7 facility.” (*Macklem, supra*, 149 Cal.App.4th at p.696.)

8        With respect to the third *Cervantes* factor, the extent to which the  
 9 inmate was confronted with evidence of his guilt, the record shows that in  
 10 the course of explaining why he was interviewing Hernandez, Detective  
 11 Garcia confronted him with some evidence of his guilt. Specifically, after  
 12 Detective Garcia identified himself and told Hernandez he was  
 13 investigating an armed robbery in Balboa Park, he showed Hernandez a  
 14 photo lineup containing a photo of Ifopo and informed Hernandez that  
 15 Ifopo had been identified as a suspect. Detective Garcia then showed  
 16 Hernandez a photo lineup containing Hernandez’s photo, told him the  
 17 victim had identified him, and explained that he was there to hear  
 18 Hernandez’s side of the story. Before Detective Garcia attempted to  
 19 advise Hernandez of his *Miranda* rights, Hernandez grabbed the lineup  
 20 containing his photo, looked at it, and made statements that Detective  
 21 Garcia described as “sudden” and “spontaneous.” Hernandez stated he  
 22 “didn’t rob anybody,” and he knew Ifopo as “Samoan Alex,” and he  
 23 remembered one time when the two of them were at a park near the zoo  
 24 smoking marijuana and Ifopo showed him what Hernandez believed was  
 25

1 a black pellet gun. In his testimony, Detective Garcia stated he did not  
 2 interrupt Hernandez and, when Hernandez was done, he attempted to  
 3 advise Hernandez of his *Miranda* rights, as Hernandez acknowledged  
 4 during his testimony. Hernandez, however, immediately ended the  
 5 interview, telling Detective Garcia, “You ain’t going to read me no rights.  
 I ain’t even going to talk about this no more.” Detective Garcia testified  
 6 that Hernandez knocked on the door and a deputy arrived 30 to 60 seconds  
 7 later to retrieve him. According to Detective Garcia, Hernandez “didn’t  
 8 give [him] a chance to *Mirandize* him.”

9 With respect to the fourth *Cervantes* factor, whether any additional  
 10 pressure was exerted to detain the inmate, the forgoing circumstances do  
 11 not disclose that any additional pressure was exerted to detain Hernandez  
 12 and coerce him into participating in the interview. Hernandez was given  
 13 the opportunity to leave the visiting room at any time during the interview.

14 We conclude under the totality of the circumstances that Hernandez  
 15 was not in custody for *Miranda* purposes during his jailhouse interview,  
 16 the protections of *Miranda* thus did not apply, and the fact he made  
 17 spontaneous statements before Detective Garcia attempted to give a  
 18 *Miranda* warning did not make those statements inadmissible.

19 . . .

20 For all the foregoing reasons, we conclude the court did not err in  
 21 denying Hernandez’s suppression motion.

22 (Lodgment No. 7 at 20-25.)

23 Clearly established Supreme Court law provides that *Miranda* warnings are  
 24 required for a person questioned by police after being “taken into custody or otherwise  
 25 deprived of his freedom in any significant way.” *Miranda*, 384 U.S. at 444. The  
 26 ultimate inquiry into whether custody has attached “is simply whether there [was] a  
 27 formal arrest or restraint on freedom of movement of the degree associated with a  
 28 formal arrest.”” *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *California*  
*v. Beheler*, 463 U.S. 1121, 1125 (1983).) The fact that a person is detained a jail facility  
 does not necessarily make questioning of that person a custodial interrogation for  
 purposes of *Miranda*. *Beheler*, 462 U.S. at 1125; *Howes v. Fields*, 132 S.Ct. 1181,  
 1187 (2012); *Cervantes v. Walker*, 589 F.2d 424, 427-28 (9th Cir. 1978). Instead the  
 totality of the circumstances of each case must be examined. *Howes*, 132 S.Ct. at 1189;  
*Yarborough v. Alvarado*, 541 U.S. 652, 661-62 (2004). Because the Supreme Court’s  
 test for determining custody is a general standard, the range of reasonable judgment by

1 a state court on this issue is broad. *Yarborough*, 541 U.S. at 663-64.

2 In *Thompson v. Keohane*, 516 U.S. 99, 112 (1995), the Supreme Court explained  
 3 that the custody determination for *Miranda* purposes requires two inquiries. First, the  
 4 state court must determine what the circumstances surrounding the interrogation were.  
 5 *Id.* at 112. That is a factual inquiry, entitled to a presumption of correctness under 28  
 6 U.S.C. § 2254(d). *Id.* Second, given those circumstances, the court must determine  
 7 whether a reasonable person would have felt he or she was not at liberty to terminate  
 8 the interrogation and leave. *Id.* at 112-13. This second inquiry calls for an application  
 9 of the controlling legal standard to the historical facts and presents a mixed question of  
 10 law and fact qualifying for independent review by the habeas court. *Id.* at 102 (stating  
 11 “state court determinations as to whether suspect was ‘in custody’ at time of  
 12 interrogation for purposes of *Miranda* is not entitled statutory presumption of  
 13 correctness during federal habeas corpus review”). In a prison context, the following  
 14 factors are relevant to determine whether a reasonable person would believe that there  
 15 had been a restriction of his freedom over and above that in his normal prisoner setting:

16 [1] the language used to summon the individual, [2] the physical  
 17 surroundings of the interrogation, [3] the extent to which he is confronted  
 18 with evidence of his guilt, and [4] the additional pressure exerted to detain  
 him.

19 *Cervantes*, 589 F.2d at 428. *See also Howes*, 132 S. Ct. at 1192 (“When a prisoner is  
 20 questioned, the determination of custody should focus on all the features of the  
 21 interrogation. These include the language that is used in summoning the prisoner to the  
 22 interview and the manner in which the interrogation is conducted.”).

23 Although Petitioner alleges he should have been given *Miranda* warnings, he  
 24 does not challenge the state court’s factual findings of the circumstances surrounding  
 25 the interrogation. Accordingly, this Court presumes those findings are correct pursuant  
 26 to 28 U.S.C. § 2254(e)(1). Next, considering the factors set forth in *Cervantes*, the  
 27 Court concludes that the California Court of Appeal’s determination that Petitioner was  
 28 not in custody, was not an unreasonable application of clearly established law.

Petitioner was in custody at the county jail for a parole violation when he was interviewed by Detective Garcia on November 20, 2008. (Lodgment No. 7 at 5, 7.) As to the first factor, Petitioner was notified by a loud speaker, "Hernandez, you have a professional visit." (Lodgment No. 7 at 10.) Petitioner went freely to the visitor room. (*Id.* at 11.) Detective Garcia was dressed in civilian clothes, identified himself, and indicated that he was investigating a robbery that had occurred in Balboa Park. (*Id.* at 20.)

As to the second factor, the interview took place in a visitor room, where inmates can meet with family, attorneys, investigators, and police officers. (Lodgment No. 7 at 10.) The room contains three booths, and the inmate's area is separated from the visitor's area by bars. (*Id.* at 20.) The visitor room is locked. (*Id.* at 10.) However, if an inmate does not want to talk to the visitor, he can push a buzzer to let the guard know he is done. (*Id.*) Petitioner was familiar with the visitor room, and had previously been interviewed there while he was in custody. (*Id.* at 10.)

As to the third factor, after Detective Garcia introduced himself to Petitioner, he did confront Petitioner with some evidence of his guilt. Detective Garcia showed Petitioner the photo lineup that contained Ifopo's picture. (*Id.* at 8.) Then he showed Petitioner the photo lineup that contained Petitioner's photo. (*Id.*) Detective Garcia told Petitioner he had been identified by the victim, and said he was there to get Petitioner's side of the story. (*Id.* at 9.) Petitioner testified at the suppression hearing that he viewed Detective Garcia's statement as an accusation. (*Id.* at 10.) After Petitioner looked at the lineup he stated "I didn't rob anyone." (*Id.*) He also indicated he knew Ifopo as "Samoan Alex", and remembered smoking marijuana at Balboa Park with him once and Ifopo showed him a black pellet gun. (*Id.*) Detective Garcia attempted to *Mirandize* Petitioner, but Petitioner stood up and said he did not want to talk to the Detective anymore. (*Id.* at 8-9.)

Regarding the fourth factor, Petitioner was not restrained or handcuffed. (*Id.* at 21.) The interview lasted approximately 8 to 12 minutes. (*Id.* at 9.) Petitioner knew

1 he could summon the guard at any time if he wanted to leave. (*Id.* at 11.) When  
 2 Petitioner decided he didn't want to talk to Detective Garcia anymore, he got up and  
 3 knocked on his door. (*Id.* at 9.) Approximately 30 to 60 seconds later, a deputy came  
 4 and removed Petitioner from the room. (*Id.*)

5 Although there are some facts that suggest Petitioner was in custody during the  
 6 interview, the state court weighed the factors and determined that under the totality of  
 7 the circumstances, Petitioner was not in custody for purposes of *Miranda*. The Court  
 8 finds the state court's weighing of the factors and application of clearly established  
 9 federal law was reasonable. *See Yarborough*, 541 U.S. at 664-65 (recognizing that the  
 10 custody test is a general one, which gives state courts more leeway in reaching case-by-  
 11 case results); *Stanley v. Schriro*, 593 F.3d 612, 618-19 (9th Cir. 2010) (citing  
 12 *Yarborough* and denying habeas relief because "the state court delineated and weighted  
 13 factors comparable to those the Supreme Court has considered"); *see, e.g. Beheler*, 463  
 14 U.S. at 1125 (concluding that the defendant was not "in custody" even though the police  
 15 suspected him of the crime and the interview took place at the police station);  
 16 *Mathiason*, 429 U.S. at 495 (finding no indication that the questioning took place in a  
 17 context where the suspect's freedom to leave was restricted in any way even though the  
 18 police interviewed the suspect at the police station and indicated they suspected he was  
 19 involved in the burglary).

20 After considering the totality of the circumstances, the Court finds the Court of  
 21 Appeal's determination that Petitioner was not in custody for purposes of *Miranda* was  
 22 not contrary to, or an unreasonable application of, clearly established federal law under  
 23 28 U.S.C. § 2254(d). Accordingly, the Court recommends that Petitioner's claim in  
 24 ground two be **DENIED**.

25     ///

26     ///

27     ///

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1           **E. Ground Three: Trial Court Failed to Instruct the Jury on**  
 2           **Competence and Intent**

3           In ground three, Petitioner alleges his due process rights were violated when the  
 4 trial court failed to instruct the jury on competence and intent. (ECF No. 4 at 8.)  
 5 Respondent argues the trial court properly declined to instruct the jury on competence  
 6 and that the jury was, in fact, instructed on intent. (ECF No. 19 at 12.) The Court  
 7 agrees with Respondent.

8           Petitioner contends he was denied a fair trial and his right to due process because  
 9 the trial court failed to instruct the jury on competence. (ECF No. 4 at 4.) Petitioner  
 10 did not raise this claim in the lower courts, but did present it in his Petition for Writ of  
 11 Habeas Corpus to the California Supreme Court, which the Court summarily denied.  
 12 (Lodgment Nos. 16 and 17.) Because there is no reasoned state court decision to which  
 13 this Court can look through to, the Court must independently review the record to  
 14 determine if the California Supreme Court's rejection of this claim was objectively  
 15 reasonable. *See Delgado*, 222 F.3d at 982.

16           A petitioner can obtain federal habeas relief on a jury instruction claim if he can  
 17 demonstrate that the instructional error "by itself so infected the entire trial that the  
 18 resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)  
 19 (*citing Cupp v. Naughten*, 414 U.S. 141, 147 (1983)). If a federal habeas court  
 20 determines that the trial court erred in instructing the jury, it must also determine  
 21 whether the error prejudiced the defendant. *See Henderson v. Kibbe*, 431 U.S. 145,  
 22 153-54 (1977). A challenged instruction must not be viewed in isolation; instead, it  
 23 must be considered "in the context of the instructions as a whole and the trial record."  
 24 *Estelle*, 502 U.S. at 72 (*citing Cupp*, 414 U.S. at 147).

25           A petitioner challenging a trial court's failure to give a jury instruction has a  
 26 much heavier burden than one challenging an erroneous instruction that was given.  
 27 *Henderson*, 431 U.S. at 155. "An omission or an incomplete instruction, is less likely  
 28 to be prejudicial than a misstatement of the law." *Id.* To determine whether a defendant

1 was prejudiced by the omission of a jury instruction, the Court must look at the  
 2 adequacy of the instructions that were actually given. *Id.* at 154, 156.

3 As the Court previously explained, the record does not show that Petitioner's  
 4 competency was at issue during the trial. Indeed, Petitioner did not raise incompetency  
 5 as a defense. (Lodgment No. 2 at 1352-79). Therefore, there was no reason for the trial  
 6 court to instruct the jury on competency. Because Petitioner's competence was not at  
 7 issue, the Court finds the failure to give a competency instruction did not render the trial  
 8 so fundamentally unfair as to violate federal due process. *Cupp v. Naughten*, 414 U.S.  
 9 147 (1973).

10 Petitioner also contends he was denied a fair trial and his right to due process as  
 11 a result of the trial court's failure to instruct the jury on intent.<sup>3</sup> This claim is refuted by  
 12 the record. The jury was instructed on intent. Specifically, the following written  
 13 instruction was given:

14       The defendants are charged in Counts One and Two with robbery.  
 15 To prove that the defendant is guilty of this crime, the People must prove  
 16 that: . . . 5. When the defendant used force or fear to take the property, he  
 17 intended to deprive the owner of it permanently or to remove it from the  
 18 owner's possession for so extended a period of time that the owner would  
 19 be deprived of a major portion of the value or enjoyment of the property.

20       The defendant's intent to take the property must have been formed  
 21 before or during the time he used force or fear. If the defendant did not  
 22 form this required intent until after using the force or fear, then he did not  
 23 commit robbery.

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24       <sup>3</sup> The Court notes that on direct appeal, Petitioner argued the trial court failed to instruct the  
 25 jury on the element of knowledge for the firearm enhancement. (Lodgment No. 3.) It does not appear  
 26 that Petitioner is raising that argument here. However, to the extent he is, the Court finds that he is  
 27 not entitled to relief. The Court of Appeal rejected Petitioner's argument on the ground that under  
 28 California law, the firearm enhancement does not have a scienter requirement. *See People v. Overton*  
 (1994) 28 Cal.App.4th 1497, 1500 ("there is no scienter requirement for an aider or abettor to be found  
 vicariously armed with a firearm under section 12022[(a)(1)]"). Therefore, the Court of Appeal found  
 the trial court had no duty to instruct the jury on knowledge regarding the firearm enhancement.  
 (Lodgment No. 7 at 27.) The state court's determination of state law issues cannot be reviewed by  
 a federal habeas court. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a  
 federal habeas court to reexamine state-court determinations on state-law questions."). Therefore, to  
 the extent Petitioner's claim rests on the Court of Appeal's decision regarding the intent instruction  
 for the firearm enhancement, he has not presented a cognizable federal claim. Moreover, Petitioner  
 has not demonstrated that the Court of Appeal's decision is contrary to, or an unreasonable application  
 of, clearly established federal law.

1 (Lodgment No 1. at 125.)

2 In addition, the trial Judge verbally instructed the jury as follows:

3       The People must prove not only that the defendant did the acts  
4 charged, but also that he acted with a particular intent. The instruction for  
each crime and allegation explains the intent required, and intent may be  
proved by circumstantial evidence.

5       ...

6       The following allegations require general criminal intent:  
7       vicarious arming as charged in Counts 1 and 2 against defendant  
Hernandez.

8       For you to find the allegations true, the person must not only  
9 commit the prohibited act, but must do so with wrongful intent. A person  
10 acts with wrongful intent when he intentionally does a prohibited act on  
purpose. However, it is not required that he intends to break the law. The  
act required is explained in the instructions for that crime or allegation.

11       The following crimes require specific intent: robbery as charged in  
12 Counts 1 and 2. . . . Aiding and abetting also requires specific intent. For  
13 you to finds a person guilty of these crimes, that person must not only  
intentionally commit the prohibited act but must do so with the specific  
14 intent. The act and specific intent required are explained in the instruction  
for that crime.

15 (Lodgment No. 2 at 1313, 1315-16.)

16       The trial court also provided jury instructions on Circumstantial Evidence: Intent;  
17 Union of Act and Intent: General and Specific Intent Together; and Aiding and  
18 Abetting: Intended Crimes. (*See* Lodgment No. 1 at 100, 103, 124.)

19       Because there was no evidence that Petitioner's competency was at issue during  
20 the trial, and because the trial court in fact instructed the jury on intent, the Court finds  
21 the California Supreme Court's rejection of this claim was not contrary to, or an  
unreasonable application of, clearly established federal law. Accordingly, the Court  
22 recommends that Petitioner's claim in ground three be **DENIED**.

24       **F. Ground Four: Ineffective Assistance of Counsel**

25       In ground four, Petitioner claims his trial counsel was ineffective. (ECF No. 4  
26 at 9.) He alleges five instances of deficient performance: (1) counsel allowed a  
27 prejudicial lineup to be introduced into evidence; (2) counsel allowed the *Miranda* issue  
28 to stand; (3) counsel allowed statements of guilt into evidence; (4) counsel failed to file

1 a motion regarding Petitioner's competency; and (5) counsel failed to act as an advocate  
2 during sentencing. (*Id.* at 9.) Respondent counters that the state court properly rejected  
3 Petitioner's claim because he failed to establish either prong of the *Strickland* test for  
4 ineffective assistance of counsel. (ECF No. 19 at 18-21.) For the reasons set forth  
5 below, the Court agrees with Respondent.

6 Petitioner presented his ineffective assistance of appellate counsel claim to the  
7 California Supreme Court in his Habeas Petition, and it was denied without comment.  
8 (Lodgment Nos. 15 and 18.) Because Petitioner did not raise this claim in the lower  
9 courts, there is no reasoned state court decision to which this Court can look through  
10 to. Therefore, the Court must independently review the record to determine if the  
11 California Supreme Court's rejection of this claim was objectively reasonable. *See*  
12 *Delgado*, 223 F.3d at 982.

13 The clearly established United States Supreme Court precedent governing  
14 ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668  
15 (1984). *See Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir. 1996) (stating that  
16 *Strickland* "has long been clearly established federal law determined by the Supreme  
17 Court of the United States"). Under *Strickland*, Petitioner must show both incom-  
18 petence of counsel and prejudice in order to justify issuance of the writ. *Strickland*, 466  
19 U.S. at 688. However, the court need not address both prongs if the petitioner fails to  
20 make a sufficient showing of either one. *Id.* at 697.

21 A petitioner can establish incompetency by showing counsel's performance fell  
22 below an objective standard of reasonableness. *Id.* at 688. However, judicial scrutiny  
23 of counsel's performance should be highly deferential. *Id.* at 689. There is a "strong  
24 presumption that counsel's conduct falls within a wide range of reasonable professional  
25 assistance." *Id.* at 686-87. A petitioner can establish prejudice by showing that "there  
26 is a reasonable probability that, but for counsel's unprofessional errors, the result of the  
27 proceeding would have been different. A reasonable probability is a probability  
28 sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *See*

1     also *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

2         “Federal habeas courts must guard against the danger of equating  
 3         unreasonableness under *Strickland* with unreasonableness under § 2254(d).”  
 4         *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011) (reversing a Ninth Circuit en banc  
 5         grant of habeas relief on an ineffective assistance claim for lack of sufficient deference  
 6         to the state court result). “[T]he question is not whether counsel’s actions were  
 7         reasonable,” but rather “whether there is any reasonable argument that counsel satisfied  
 8         *Strickland*’s deferential standard.” *Id.* See also *Cullen v. Pinholster*, 131 S.Ct. 1388,  
 9         1403 (2011) (“We take a ‘highly deferential’ look at counsel’s performance . . . through  
 10         the ‘deferential lens of § 2254(d).’”) (citation omitted). The petitioner “must show that  
 11         the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable  
 12         manner.” *Bell v. Cone*, 535 U.S. 685, 699 (2002).

13             **1. Ineffective Assistance of Counsel for Allowing Lineup to be  
 14                 Introduced Into Evidence**

15         First, Petitioner claims that his trial counsel provided ineffective assistance by  
 16         failing to suppress a suggestive and prejudicial photographic lineup. (ECF No. 4 at 9.)  
 17         This argument fails because defense counsel did, in fact, move to suppress the lineup.

18         On July 20, 2009, Petitioner’s counsel filed a Motion in Limine to Suppress  
 19         Identification Evidence, urging the court to suppress both the out-of-court identification  
 20         of Petitioner as the perpetrator of the crime, as well as any subsequent in-court  
 21         identifications of Petitioner as the perpetrator of the crime. (Lodgment No. 1 at 49-55.)  
 22         The motion contended the witness’s identification of Petitioner at a pretrial  
 23         confrontation was unnecessarily suggestive and conducive to irreparable mistaken  
 24         identification. (*Id.*) Petitioner’s counsel also argued the motion before the trial court.  
 25         (Lodgment No. 2 at 253-65.) The trial court denied the motion. (*Id.* at 265.)

26         The fact that an attorney loses an argument is not an indicator of overall poor  
 27         performance. In our adversarial legal system, which by definition results in a winner  
 28         and a loser, a loss does not necessarily equate with incompetence of counsel. Here,

1 Petitioner's counsel presented the trial court with a well-reasoned motion, and zealously  
 2 argued the motion before the Court. The fact that the motion was ultimately denied  
 3 does not mean counsel provided ineffective assistance. Petitioner, therefore, fails to  
 4 show that his attorney's conduct fell below an objective standard of reasonableness.  
 5 Further, because counsel did raise the argument and it was rejected, Petitioner cannot  
 6 satisfy the prejudice prong, which requires Petitioner to show there is a reasonable  
 7 probability that the result of the proceedings would have been different. *Strickland*, 466  
 8 U.S. at 694

9 Based on an independent review of the record, the Court finds the California  
 10 Supreme Court's denial of this claim was not contrary to, or an unreasonable  
 11 application of, clearly established Federal law. Accordingly, the Court recommends  
 12 that Petitioner's claim in ground four based on the photographic lineup be **DENIED**.

13       **2. Ineffective Assistance of Counsel For Allowing *Miranda* Issue**  
 14       **to Stand**

15 Second, Petitioner alleges his trial counsel was ineffective because he allowed  
 16 the *Miranda* issue to stand. (ECF No. 4 at 9.) Petitioner's claim is not supported by the  
 17 record. On July 20, 2009, Petitioner's counsel filed a Motion in Limine to Suppress  
 18 Defendant's Custodial Statements, requesting the court prohibit the prosecution from  
 19 mentioning any of the statements Petitioner made to Detective Garcia while he was in  
 20 custody. (Lodgment No. 1 at 56-62.) At the suppression hearing, Petitioner's counsel  
 21 vigorously cross-examined the prosecution's witness, Detective Garcia, and called  
 22 Petitioner to testify. (Lodgment No. 2 at 215-246.) Counsel also argued the motion  
 23 before the court. (*Id.* at 247-48.) The court denied the motion in part, and granted it in  
 24 part. (*Id.* at 251-52.) Specifically, the court held Petitioner's statements to Detective  
 25 Garcia were admissible up until the detective asked Petitioner where he was on the date  
 26 in question. The court found that from that point on, any statements Petitioner made  
 27 should be suppressed. (*Id.* at 252.)

28 It appears Petitioner's counsel did all that he could reasonably be expected to do

1 to try and suppress Petitioner's statements. As explained above, competence does not  
 2 require an attorney to win every argument. Therefore, Petitioner has not shown that his  
 3 attorney's conduct fell below an objective standard of reasonableness simply because  
 4 he did not prevail on the motion to suppress statements. Nor can Petitioner show that  
 5 he was prejudiced under *Strickland*.

6 Based on an independent review of the record, the Court finds the California  
 7 Supreme Court's denial of this claim was not contrary to, or an unreasonable  
 8 application of, clearly established federal law. Accordingly, the Court recommends that  
 9 Petitioner's claim in ground four regarding the *Miranda* statements be **DENIED**.

10       **3. Ineffective Assistance of Counsel For Failure to Suppress**  
 11       **Petitioner's Statements of Guilt**

12       Third, Petitioner alleges his trial counsel was ineffective for allowing Petitioner's  
 13 statements of guilt into evidence. (ECF No. 4 at 9.) This claim is the same as  
 14 Petitioner's claim of ineffective assistance based on allowing the *Miranda* issue to  
 15 stand. As already explained, Petitioner's counsel attempted to prevent the admission  
 16 of Petitioner's statements by filing and arguing a motion to suppress statements.  
 17 (Lodgment No. 1 at 56-62; Lodgment No. 2 at 215-248.) The fact that the court denied  
 18 the motion does not amount to incompetence on the part of defense counsel. Petitioner  
 19 has not shown that his counsel's performance was otherwise deficient or that he was  
 20 prejudiced under *Strickland*.

21       Based on an independent review of the record, the Court finds the California  
 22 Supreme Court's denial of this claim was not contrary to or an unreasonable application  
 23 of clearly established federal law. Accordingly, the Court recommends that Petitioner's  
 24 claim in ground four regarding Petitioner's statements of guilt be **DENIED**.

25       **4. Ineffective Assistance of Counsel for Failing to File a Motion**  
 26       **Regarding Petitioner's Competency**

27       Fourth, Petitioner alleges his trial counsel was ineffective for filing a Romero  
 28 motion prior to his sentencing, which contained information regarding Petitioner's

1 mental capacity. (ECF No. 4 at 9.) It appears Petitioner is arguing counsel should have  
 2 filed a motion regarding Petitioner's competency earlier in the proceedings. As  
 3 previously addressed regarding Petitioner's claim that the trial court failed to hold a  
 4 competency hearing, there was no evidence that Petitioner was incompetent during the  
 5 proceedings. Because there was no evidence to create a doubt about Petitioner's  
 6 competency, counsel was not ineffective for failing to file an earlier motion regarding  
 7 Petitioner's competency. *United States v. Shah*, 878 F.2d 1156, 1162 (9th Cir. 1989)  
 8 (counsel is not ineffective for failing to raise a meritless legal argument).

9       Based on an independent review of the record, the Court finds the California  
 10 Supreme Court's denial of this claim was not contrary to, or an unreasonable  
 11 application of, clearly established federal law. Accordingly, the Court recommends  
 12 that Petitioner's claim in ground four regarding Petitioner's competency be **DENIED**.

13       **5. Ineffective Assistance of Counsel For Failing to Act as an**  
**Advocate During Sentencing**

15       Finally, Petitioner alleges ineffective assistance on the ground that his counsel  
 16 failed to act as an advocate during sentencing. (ECF No. 4 at 9.) Again, Petitioner's  
 17 claim is belied by the record. Trial counsel sought and obtained a mental evaluation by  
 18 Dr. Friedman prior to sentencing, filed a Romero motion urging the court to strike one  
 19 of Petitioner's prior strike convictions, presented the court with three personal reference  
 20 letters, and argued for a lesser sentence based on Petitioner's mental condition and drug  
 21 addiction. (Lodgment No. 1 at 260-74, 282-88, 289-92, Lodgment No. 2 at 1445-46.)  
 22 Petitioner complains that the Romero motion was mistitled and that his counsel did not  
 23 make sure the court read the motion. (ECF No. 27 at 6.) However, a review of the  
 24 motion shows that it was properly titled, as counsel was specifically requesting relief  
 25 from the court pursuant to *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996).  
 26 (Lodgment No. 1 at 282.) Petitioner's speculation that the court didn't read the motion  
 27 is not supported by the record. (See Transcript from March 16, 2010 Sentencing  
 28 Hearing, Lodgment No. 2 at 1444 ("I've read the motion to strike the prior with all the

1 letters that are attached.”)) Although the court denied the Romero motion, and imposed  
 2 a hefty sentence under the three strikes law, counsel nonetheless met his obligation to  
 3 defend Petitioner at the sentencing. Petitioner has not shown that his counsel’s  
 4 performance was deficient or that he was prejudiced under *Strickland*.

5 Based on an independent review of the record, the Court finds the California  
 6 Supreme Court’s denial of this claim was not contrary to, or an unreasonable  
 7 application of, clearly established Federal law. Accordingly, the Court recommends  
 8 that Petitioner’s claim in ground four regarding sentencing be **DENIED**.

### 9 III. CONCLUSION AND RECOMMENDATION

10 The Court submits this Report and Recommendation to United States District  
 11 Judge Roger T. Benitez under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the  
 12 United States District Court for the Southern District of California. For all the  
 13 foregoing reasons, **IT IS RECOMMENDED** this habeas Petition be **DENIED** on the  
 14 grounds that Petitioner is not in custody in violation of any federal right. **IT IS**  
 15 **FURTHER RECOMMENDED** the Court issue an Order (1) approving and adopting  
 16 this Report and Recommendation and (2) directing that judgment be entered denying  
 17 the Petition.

18 **IT IS HEREBY ORDERED** no later than **May 29, 2013**, any party to this action  
 19 may file written objections with the Court and serve a copy on all parties. The  
 20 document should be captioned “Objections to Report and Recommendation.”

21 **IT IS FURTHER ORDERED** any Reply to the Objections shall be filed with  
 22 the Court and served on all parties no later than fourteen (14) days from service of  
 23 Petitioner’s filed Objections. The parties are advised that failure to file objections  
 24 within the specified time may waive the right to raise those objections on appeal of the  
 25 Court’s Order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v.*  
*Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

27 DATED: April 29, 2013

  
 28 DAVID H. BARTICK  
 United States Magistrate Judge